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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GERALD TUCKER, Defendant and Appellant.	F041408 (Super. Ct. No. 60986) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Gerald Tucker of the custodial possession of a weapon (Pen. Code,[1] § 4502, subd. (a)) and acquitted him of battery upon a peace officer. Appellant was also found to have suffered four serious or violent felony convictions within the meaning of California's Three Strikes Law and to have served a prior prison term within the meaning of section 667.5, subdivision (b).

The charges stemmed from an incident that occurred during the preliminary hearing in an unrelated case in which appellant was charged with, and ultimately convicted of, murder. Appellant, who was seated at counsel table and upset when held to answer on the murder charge, stood up and slashed his throat with a disposable razor blade. Sheriff deputies wrestled with appellant and ultimately removed the razor blade from appellant's fist. The incident was caught on videotape -- apparently made by a local media company -- which included a brief picture of the victim and views of appellant in physical restraints. The tape was shown to the jury at the trial in this case.[2] Appellant was sentenced as a third striker to an indeterminate term of 25 years to life, plus an additional one year for the prior prison term.

DISCUSSION

I.

First, there was no misconduct by the prosecutor with respect to the introduction of the video tape, the audio portion of which disclosed the nature of the charge -- murder -- involved in the prior action. Before playing the tape for the jury, the prosecutor informed the court that there would be no accompanying audio. The court, however, asked "Why don't we have sound." After an ensuing bench discussion, the court

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1 All further references are to the Penal Code unless otherwise noted.

2 The tape shows appellant in prison garb, shackled, handcuffed and wearing a belly chain. It also disclosed, by means of the accompanying oral commentary, that the charge against appellant was murder.

misunderstood the prosecutor's reason for wanting to play the tape without audio and ordered that the tape be played with it. [3]

Thus, it was action by the court, not action by the prosecutor, that caused the subject disclosure to the jury. (*People v. Rowland* (1992) 4 Cal.4th 238, 274 [the test for misconduct is whether *the prosecutor* has employed deceptive or reprehensible methods to persuade either the court or the jury]; *People v. Bryden* (1998) 63 Cal.App.4th 159, 182 [whether *a prosecutor is guilty of misconduct* must be determined in light of the particular factual situation involved in each case].)

Secondly, even if there was prosecutorial misconduct, it did not prejudice appellant. (*People v. Benson* (1990) 52 Cal.3d 754, 793 [what is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant]; *People v. Bolton* (1979) 23 Cal.3d 208, 214 [misconduct will lead to reversal only upon showing of prejudicial unfairness at trial].) The jury acquitted appellant of the battery charge, the offense most susceptible to jury influence by suggestions of a violent nature. In addition, the court told the jury the audio portion of the tape contained irrelevant and inadmissible evidence, and, when the tape was sent to the jury room, the foreman was given explicit instructions by the court that the jurors could not listen to the audio part of the tape. There is no evidence these instructions were

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[3] The court later put on the record details of the bench conference. The court stated "Before the tape was played, the prosecutor approached the bench with counsel and stated that he did not want -- he wanted to play the tape without the sound. [Defense] Counsel was present and I asked him why the sound wasn't going to be played and defense counsel said that there was sound on his copy of the tape, and I assumed from that that counsel had heard the tape …, [¶] I asked the prosecutor why he wanted to play the tape without sound and he said there was an over voice from the reporter. I assumed from that that he meant the court reporter rather than a newspaper reporter. There was no objection on the part of the defense counsel. And the Court told the prosecutor to play the tape with the sound." The court, immediately after the tape was played, instructed the jury that it could not consider the nature of the charges in the other case.

disregarded. (*People v. Cain* (1995) 10 Cal.4th 1, 52 [the appellate court, in the absence of contrary evidence, may presume the jury followed trial court's instructions].)

Finally, the evidence proving appellant committed the weapons offense was essentially uncontroverted at trial. He was indisputably an inmate, and the video tape, even without audio, established that he possessed the razor blade. Appellant presented no factual defense to the charge; his defenses were purely legal -- whether the razor blade was a deadly weapon and whether appellant was a state prisoner.[4] We are satisfied beyond a reasonable doubt that the result of the trial would not have been more favorable to appellant had the audio part of the tape, or, for that matter, the momentary image of the victim, not been exposed to the jury.

II.

Admission of the tape, which showed appellant in shackles, handcuffs and a belly chain, was neither misconduct nor error.

First, the issue was waived because it was not raised at trial. (Evid. Code, § 353; *People v. Boyette* (2002) 29 Cal.4th 381, 431 [unless excused from objecting, defendant who failed to object to alleged misconduct at trial did not preserve issue for presentation on appeal].)

Second, even if the issue was not waived, appellant has not shown he was prejudiced by the video depiction of him in restraints. "Prejudice" does not mean a result

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[4] The defense that appellant was not a prisoner does not have merit, and this is obviously why counsel did not raise it. However, appellant insisted it be considered and raised it repeatedly. Section 4502 prohibits the possession of any weapon by a person confined in "*any penal institution"* (§ 4502, subd. (a).) Earlier versions of the statute contained the language "while confined in a state prison." (Former § 4502, enacted Stats. 1943, ch. 173, p. 1068, § 2, amended by Stats. 1994, ch. 354, § 1.) The statute as amended in 1994 changed the language from "state prison" to "any penal institution." The same amendments added subdivision (c), which expressly defines "penal institution" as "state prison, a prison road camp, prison forestry camp, or other prison camp or farm, or a *county jail* or county road camp." (§ 4502, subd. (c), italics added.)

which is unfavorable; it means a result which is unfair. (See, e.g., *Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1478-1480.) Here, appellant's in custody status was an element of the charged offense, and several witnesses testified without objection that appellant had been restrained in shackles, handcuffs, and a belly chain at the preliminary hearing. Thus, the fact that appellant was shown to be in physical restraints in the video added nothing new to the jury's knowledge. Furthermore, as previously stated, the evidence of appellant's guilt of the possession charge was overwhelming and essentially undisputed. (See *People v. Medina* (1995) 11 Cal.4th 694, 731 [unless the guilt question is close, allowing the jury to briefly view a shackled defendant is ordinarily deemed nonprejudicial error].)

III.

The trial court did not err with respect to appellant's *Marsden*[5] motion

The court complied with its duty under *Marsden*. The trial court conducted a full hearing before ruling on appellant's motion to dismiss his appointed counsel. When asked to explain his reasons for wanting new counsel, appellant stated that "counsel is inadequate" because appellant was "not a state prisoner" and counsel had failed to properly file a petition for writ of prohibition in the appellate court, thereby "depriv[ing] defendant of contact with that court." He also complained that counsel had not talked to him about a "jury," or "information or witnesses or anything." Defense counsel responded by explaining that he disagreed with appellant's belief that section 4502 was not satisfied, but nonetheless had filed with the Court of Appeal what turned out to be an unsuccessful petition for a writ of prohibition; the petition sought a legal determination on the question whether the razor blade was a weapon within the meaning of the statute. Counsel also said that, when he received appellant's motions based upon *Marsden* and

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5 *People v. Marsden* (1970) 2 Cal.3d 118.

People v. Pope (1979) 23 Cal.3d 412, counsel sent appellant a copy of the decision in *Faretta v. California* (1975) 422 U.S. 806, and explained appellant's right to self representation. Counsel's statements established that he had not denied appellant access to the courts, that there was communication between them, and that the disagreement was over the merits of the legal arguments appellant wanted to raise.

After the trial court denied appellant's *Marsden* motion, appellant continued to argue the merits of his contention that section 4502 did not apply to him. He protested he was "not represented." After a brief interruption, the court revisited the issue, assuring appellant that the legal issue would be reviewed on appeal. Defense counsel then voluntarily remarked:

> "I believe based on what Mr. Tucker has been saying and based upon what he has been saying to me for the past more than a month that there as been a clear breakdown of communications between Mr. Tucker and myself."

Appellant added:

> "We have had no communication period. None, period. I think you had yours with Acremant [sic] through his threats. And I am not in no way in any of that. That there is foolish and stupid. No one is suppose to threaten an attorney. And the same thing as I get the deputies here, you don't lay around, go around hitting deputies and threatening deputies. This is not in my position, Your Honor. I don't fit into none of that."

These comments cannot be considered in isolation and must be assessed in the context of the entire record of the *Marsden* proceedings. That record shows that the quoted statements came at the end of a lengthy inquiry into appellant's complaints. (See *People v. Freeman* (1994) 8 Cal.4th 450, 480-481 [trial court's duty under *Marsden* is to allow the defendant to state the basis for his request for new counsel].) Defense counsel simply stated the obvious -- that, despite his efforts to convince appellant of the lack of merit in appellant's reading of the statutory language, appellant continued to insist that the point be pressed. Thus, what was missing was not communication; what was missing was agreement on the merits of the defense appellant wished to present. Counsel was not

required to raise a meritless issue simply because appellant wanted counsel to do so. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162 [a defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense]; *People v. Carpenter* (1997) 15 Cal.4th 312, 376 [when a defendant chooses to be represented by professional counsel, counsel is "captain of the ship" and can make all but a few fundamental decisions]; *People v. Lucky* (1988) 45 Cal.3d 259, 280-281 [disagreement over trial strategy is insufficient to establish inadequate representation].)

A defendant is entitled to new counsel only if he or she shows that the current representation is inadequate or that the attorney-client relationship has irreparably broken down; that is, the defendant must demonstrate that a failure to appoint new counsel will substantially impair the defendant's right to the assistance of counsel. (*People v. Smith* (1993) 6 Cal.4th 684, 695-696.) Here, the record does not show that counsel lacked diligence or competence in representing appellant. Given the nature of appellant's complaints and the record of the *Marsden* proceedings, the trial court did not abuse its discretion by denying appellant's request for new counsel. (*People v. Welch* (1999) 20 Cal.4th 701 [denial of *Marsden* motion reviewed under abuse of discretion standard]; *People v. Memro* (1995) 11 Cal.4th 786, 857 [same].)

IV.

As respondent concedes, there was insufficient evidence to prove that the 1955 burglary conviction was a serious felony within the meaning of the Three Strikes Law.

In 1955, the relevant statute read as follows:

> "Every burglary of an inhabited dwelling house, trailer coach as defined by the Vehicle Code, or building committed in the night time, and every burglary whether in the day time or night time, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree. (§ 460, subd. (1), enacted 1872, as amended by Code Am.1875-76,

ch. 56, p. 112, § 2; Stats.1923, ch. 362, p. 747, § 1; Stats.1955, ch. 941, p. 1827, § 1.[6])

The abstract of appellant's 1955 first degree burglary conviction does not make certain which of these scenarios occurred; that is, the record does not show whether the crime was a (1) burglary of an inhabited dwelling house, inhabited trailer coach or some other inhabited building in the nighttime (see *People v. Clinton* (1924) 70 Cal.App. 262, 264 [word "inhibited" does not modify only "dwelling house"]) or (2) burglary committed while appellant was personally armed with a deadly weapon or, (3) burglary accompanied by an assault. (*People v. Rodriguez* (1998) 17 Cal.4th 253 [abstract of conviction establishes only least adjudicated elements of crime].) Consequently, the record does not prove that the 1955 burglary conviction was a "strike" because only the first possible scenario -- burglary of an inhabited dwelling house, inhabited trailer coach or some other inhabited building in the nighttime -- qualifies as a strike under the current definition of a "serious felony." (§ 1192.7, subd. (c) (18), § 462 (2001).[7] The other two scenarios do not, because "armed" with a deadly weapon is not equivalent to "use" of a deadly weapon during the commission of a felony (§ 1192.7, subd. (c) (23); compare *People v. Granado* (1996) 49 Cal.App.4th 317, 324-325 ["use" of weapon includes intentional act in furtherance of the crime such as displaying weapon in a menacing manner or striking someone]; with *People v. Paul* (1998) 18 Cal.4th 698, 702 ["armed"

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[6] The 1955 amendment inserted the words "trailer coach as defined by the Vehicle Code" in subdivision 1.

[7] The 2001 version of section 460 reads:

> "Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree. (§ 460, subd. (a).)

means carrying weapon so that it is available as a means of offense or defense]), and because simple assault, even during the commission of a burglary, is not a serious felony (§ 1192.7, subd. (c)).

We will therefore reverse and remand for further proceedings on the issue, if the prosecutor desires to retry appellant on the allegation. (See *Monge v. California* (1998) 524 U.S. 721 [double jeopardy does not bar retrial of sentencing determinations]; *People v. Sotello* (2002) 94 Cal.App.4th 1349, 1355 [collateral estoppel and res judicata do not bar retrial of sentencing determinations].)

V.

Appellant was not entitled to a jury trial on the factual elements relevant to the determination of whether a prior offense constitutes a strike.

The right to a jury trial on a prior conviction sentence enhancement allegation is statutory and not constitutional, and extends only to a determination of whether the record of conviction is sufficient, authentic and accurate. (§§ 1025 and 1158; *People v. Epps* (2001) 25 Cal.4th 19, 27 [jury's role is to determine only questions of authenticity, accuracy, or sufficiency of prior conviction records]; *People v. Kelii* (1999) 21 Cal.4th 452, 457 [the statutory right to have a jury decide whether the defendant has suffered prior conviction does not include determination of whether the conviction qualifies as a strike]; *People v. Wiley* (1995) 9 Cal.4th 580, 586-589 [defendants have no constitutional right to have a jury determine factual issues relating to prior convictions alleged as enhancements]; *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [in determining whether a prior conviction is serious, the trier of fact may look to the entire record of the conviction but no further].) As an intermediate appellate court, we are bound by the authoritative decisions of the state Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The true finding on the strike allegation based upon the 1955 prior burglary conviction is reversed. The sentence imposed upon appellant is reversed. The section 4502, subdivision (a) conviction and the true findings on all special allegations except the strike allegation based upon the 1955 prior burglary conviction are affirmed. The matter is remanded to the trial court. If the prosecutor elects in writing, no later than 30 days after this court's remittitur is filed in the trial court, to retry appellant on the strike allegation based upon the 1955 prior burglary conviction, the trial court shall conduct further proceedings on that allegation alone and shall resentence appellant as and when appropriate. If the prosecutor does not so elect, the trial court shall forthwith resentence appellant on the section 4502, subdivision (a) conviction and on all special allegations other than the strike allegation based upon the 1955 prior burglary conviction.

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Dibiaso, Acting P.J.

WE CONCUR:

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Vartabedian, J.

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Cornell, J.